October 18, 2018

VIA ECF AND EMAIL (sullivannysdchambers@nysd.uscourts.gov)
Honorable Richard J. Sullivan
United States District Court
Southern District of New York
Thurgood Marshall United States Courthouse
40 Foley Square, Room 2104
Courtroom 905
New York, NY 10007

RE: ***David Lane Johnson v. National Football League Players Association, et al.***
Case No. 17-cv-5131 (RJS)

Dear Judge Sullivan:

Pursuant to your October 3, 2018 Memorandum and Order (Dkt. No. 125), Plaintiff David Lane Johnson ("Johnson"), Defendant the National Football League Players Association (the "NFLPA"), and Defendants the National Football League (the "NFL") and the National Football League Management Council (the "NFLMC") (together the "NFL Defendants") submit this joint letter regarding proposed next steps with respect to Plaintiff's remaining claims. The parties propose as follows:

Plaintiff David Lane Johnson

Johnson proposes that the Court issue a scheduling order addressing initial disclosures, other discovery, dispositive motions, and trial. The Parties previously submitted a "(Proposed) Case Management Plan and Scheduling Order" addressing these and other deadlines. *See* Dkt. No. 93. Johnson requests that the Court address the NFLPA's answer to his First Amended Complaint (Dkt. No. 39), which, per Civil Rule 12(a)(4)(A), remains outstanding.

As part of Johnson's Labor Management Reporting and Disclosure Act ("LMRDA") claim, he pled both that the NFLPA violated the LMRDA by refusing to provide him a complete copy of the subject collective bargaining agreement and retaliating against him for asserting his rights. *See* Dkt. No. 39 at ¶¶ 287, 304-315. Johnson is entitled to a jury on his LMRDA claim (*see Paley v Greenberg*, 318 F. Supp. 1366 (S.D.N.Y. 1970)), and pursuant to Civil Rule 38(b), Johnson intends to file a jury demand. Johnson also intends to seek damages available to him under his LMRDA claim, which include, but are not limited to, compensatory damages, punitive damages, and his attorneys' fees and costs.[1]

[1] *See Local Union No. 38, Sheet Metal Workers' Int'l Ass'n v. Pelella*, 350 F.3d 73 (2nd Cir. 2003) (jury award of attorneys' fees and punitive damages to a union member that prevailed on a LMRDA claim appropriate even where jury awarded party only one dollar in nominal damages); *see also Berg v. Watson*, 417 F. Supp. 806, 812-13 (S.D.N.Y. 1976) (punitive damages available under the LMRDA); *Hall v. Cole*, 412 U.S. 1, 8-9 (1973) (attorneys' fee available to party who prevails on a LMRDA claim); *Rosario v. Amalgamated Ladies' Garment Cutters' Union, Local*

Since the parties already held a Civil Rule 26(f) conference, pursuant to Civil Rule 26(d)(1), Johnson intends to serve truncated discovery regarding his LMRDA claim only. Johnson intends on taking depositions and subpoenaing relevant third parties, including, but not limited to, Dr. John A. Lombardo. Defendants jointly selected Dr. Lombardo to serve as the Independent Administrator of the subject collective bargaining agreement. It remains unclear whether Dr. Lombardo is an employee of either or both the NFLPA and the NFL Defendants and is represented by either counsel for the NFLPA or counsel for the NFL Defendants. Plaintiff would like clarification on that issue to ensure proper service and contact with Dr. Lombardo.

In a letter dated October 16, 2018, the NFLPA purported to moot Johnson's LMRDA claim by providing him documents related to the subject collective bargaining agreement that it had never before provided him. With its letter, the NFLPA also provided the claimed amendment regarding the Chief Forensic Toxicologist. Dkt. No. 113-9. However, that letter clearly states that it modified the 2014 Policy on Performance Enhancing Substances, when the collective bargaining agreement at issue here is the 2015 Policy on Performance Enhancing Substances. *See* Dkt. No. 39-1. Even with the NFLPA's October 16 production, the NFLPA still has not provided Johnson the entirety of the subject collective bargaining agreement. Regardless, the NFLPA's October 16 production, particularly when combined with Dkt. No. 125, makes clear that the NFLPA has violated the LMRDA, and Johnson intends to file for summary judgment on this claim at the conclusion of discovery.

Furthermore, under the LMRDA, the NFLPA is required to maintain and provide to any requesting member a written statement of any terms of the collectively bargained agreement that have been orally modified or amended. That has never occurred and includes the purported "understanding" as to the two-year provision under which the NFL Defendants disciplined Johnson.

In addition to discovery on the entirety of the subject collective bargaining agreement, Johnson is entitled to discovery as to whether the NFLPA retaliated against him and whether the NFLPA acted maliciously or with indifference to Johnson's rights. Any attempt by the NFLPA to prevent or delay discovery on these or any related matters directly conflicts with the NFLPA's two previous assertions to this Court – that If Johnson's LMRDA claim survived the NFLPA's motion to dismiss, discovery on Johnson's LMRDA claim would proceed. *See* Dkt. No. 85 at 4 and Dkt. No. 93.

Furthermore, the NFLPA cannot moot Johnson's LMRDA claim or limit his relief under the LMRDA by providing him additional, previously non-disclosed information now, nearly two years after he filed this action. Practically, if this Court permitted the NFLPA to moot Johnson's LMRDA claim, then unions could rely upon this case to refuse an employee's request for the

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10, etc., 749 F.2d 1000, 1004 (2nd Cir. 1984) (recognizing the *Hall* decision, including the right to attorneys' fees on a LMRDA claim); *Quinn v. Di Giulian*, 238 U.S. App. D.C. 247, 739 F.2d 637 (D.C. Cir. 1984) (damages resulting from a union's breach of the LMRDA may include actual damages, punitive damages, and attorneys' fees); *Hodges v. Virgin Atlantic Airways, Ltd.*, 714 F. Supp. 75, 77 (S.D.N.Y. 1988) (recognizing the *Quinn* decision, including that a claim for damages under the LMRDA sounds in tort).

applicable collective bargaining agreement, force that employee to go through arbitration without knowledge of the applicable agreement, require that employee to file a federal lawsuit to obtain a copy of the applicable agreement, and then, after the employee has done all this, provide a copy of the applicable agreement to the employee and nothing more. Such an impractical conclusion would serve only to encourage union misconduct. The case cited by this Court to suggest that the NFLPA could possibly moot Johnson's LMRDA claim by providing him a complete copy of the subject collective bargaining agreement is distinguishable from the present facts.[2]

As to Johnson's claims against the NFL Defendants, while Johnson disagrees with the Court's ruling denying his Motion to Vacate and dismissing his duty of fair representation claims and declaratory judgment claim against the NFLPA, Johnson understands the impact the Court's ruling as to these claims has on his breach of contract claim and any remaining declaratory judgment claim against the NFL Defendants. However, due to the final judgment rule, so as not to prejudice his appeal rights, Johnson cannot voluntarily dismiss the remaining claims against the NFL Defendants. *See Rabbi Jacob Joseph Sch. v. Province of Mendoza*, 425 F.3d 207 (2nd Cir. 2005). Johnson has shared his position with the NFL Defendants and suggested the NFL Defendants file a brief motion seeking the dismissal of these claims based on the Court's

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[2] In *Gonzalez v. Local32BJ*, the plaintiff claimed the union violated his right to receive a copy of the collective bargaining agreement. *Gonzalez*, No. 09 Civ. 8464 (SHS) (RLE), 2010 U.S. Dist. LEXIS 102971 at *10, 2010 WL 3785436 (S.D.N.Y. Sept. 7, 2010). However, in his complaint, the plaintiff averred that he received a copy of the collective bargaining agreement and even attached that copy to the complaint. *Id*. Furthermore, the plaintiff did not plead that he requested a copy of the agreement, which was a prerequisite to his LMRDA claim. *Id*. Based on these facts, the court found that "since Gonzalez has a copy of the Agreement, the issue is moot and he has no § 414 claim." Here, Johnson plead that he requested and did not receive the subject collective bargaining agreement. This Court also recognized that Johnson still does not have a complete copy of that agreement.

The other case on which the Court relied – *Mazza v. Dist. Council of N.Y.* – also is distinguishable. In that case, it was "undisputed that plaintiff made no request for a copy of the CBA prior to discovery". *Mazza*, No. CV-00-6854 (BMC) (CLP), No. CV-01-6002 (BMC) (CLP), 2007 U.S. Dist. LEXIS 65965 at *39, 2007 WL 2668116 (E.D.N.Y. Sept. 5, 2007). Furthermore, plaintiff Mazza, despite filing multiple complaints, never included a LMRDA claim in his pleadings and, at most, sought to bring such a claim as part of his opposition to defendants' motion for summary judgment. *Id*. In dicta, the court reasoned that since the union ultimately provided plaintiff with a copy of the agreement, after the plaintiff presumably requested it in discovery, the union complied with the LMRDA. *Id*. at *40. Here, Johnson actually pled an LMRDA claim, including his requests for the pertinent collective bargaining agreement and its various side letters, amendments, etc., prior to his filing of this litigation.

Neither *Gonzalez* nor *Mazza* stand for the proposition that the NFLPA can moot Johnson's LMRDA claim or that Johnson's damages under the LMRDA are limited to Johnson's receipt of the subject collective bargaining agreement. Regardless, a factual dispute as to whether Johnson received the entire agreement remains.

findings in Dkt. No. 125, which Johnson will oppose. Depending on what the NFL Defendants file, Johnson expects his opposition will be short.

As a party to the subject collective bargaining agreement, Johnson informed the NFL Defendants he intends to seek discovery from them. Depending on whether the NFL Defendants remain a party to this action, Johnson intends to serve the NFL Defendants with either written discovery or a subpoena. Johnson also may need to depose members of the NFL Defendants.

NFLPA's Position

Following the Court's October 3, 2018 Order (Doc. No 125) ("Dismissal Order"), Johnson's LMRDA claim, brought under 29 U.S.C. § 414, is his only remaining claim against the NFLPA. Specifically, "Johnson alleges that the NFLPA refused to provide Johnson with all side agreements that modified the 2015 [Performance Enhancing Substances] Policy" (the "2015 Policy"). Dismissal Order at 16.[3] And as the Court held, even if Johnson could prevail on this claim, the "only relief to which Johnson would be entitled is a copy of the agreement and side letters in question." *Id.* at 17 n.3. To that end, the Court observed that Johnson's LMRDA claim would become "moot once [he] has received a full copy of the collective bargaining agreement—even if that receipt occurred during the course of litigation." *Id.* at 17.

The NFLPA maintains that Johnson cannot establish an LMRDA violation but, nevertheless, in an effort to bring this litigation to an end, the NFLPA (on October 16) produced to Johnson a complete copy of the 2015 Policy and all agreements that modified the 2015 Policy. The NFLPA does not believe that there are any other documents that it would be ordered to produce even if Johnson were to prevail on his LMRDA claim.

Because the Court specifically stated in its Dismissal Order that, according to Johnson's allegations, "the NFLPA has still not produced a copy of the side agreement relating to the bargaining parties' interpretation of the timeline for reasonable-cause testing" (Dismissal Order at 17), we note that no such side agreement was produced for the simple reason that it does not exist.[4] The NFLPA's October 16 production should, indisputably, end this matter. The Court's guidance in the Dismissal Order and supporting case law confirms as much. *See, e.g., Gonzalez v. Local 32BJ, SEIU*, No. 09 CIV. 8464 SHS RLE, 2010 WL 3785436, at *4 (S.D.N.Y. Sept. 7, 2010), *report and recommendation adopted*, No. 09 Civ. 8464 (SHS) (RLE), 2010 WL 3785363

[3] *See also* First Am. Compl. ¶¶ 310, 312, 313, ECF No. 39. In Mr. Johnson's Memorandum of Law in Opposition to Defendant NFLPA's Motion to Dismiss, he confirmed that the only documents at issue with regard to his LMRDA claim are any "modifications to the collectively bargained 2015 Policy." ECF No. 112 at 29. "Specifically, the NFLPA refused to share with Johnson…purported modifications to the collectively bargained 2015 Policy. . . The NFLPA provides a website, which it claims includes the Policy . . . but that link is to a newer policy (*not* the Policy applicable here)." *Id.* (emphasis added).

[4] As Arbitrator Carter explained in the October 11, 2016 Arbitral Award, and as Dr. Lombardo testified at the hearing, the interpretation of the timeline for reasonable-cause testing was left to Dr. Lombardo's discretion—the bargaining parties did not supply their own interpretation. Arb. Award at ¶ 6.15, 6.19, ECF No. 3, Ex. 2; Arb. Hearing. Tr. 170:4-171:9, ECF No. 3, Ex. 9.

(S.D.N.Y. Sept. 28, 2010) ("[Plaintiff] submitted a copy of the CBA with his Complaint. Thus, since [Plaintiff] has a copy of the Agreement, the issue is moot and he has no § 414 claim"); *Mazza v. Dist. Council of N.Y.*, No. Civ. 6854 (BMC) (CLP), 2007 WL 2668116, at *14 (E.D.N.Y. Sept. 6, 2007) ("[P]laintiff was ultimately provided with a copy of the [CBA]. Therefore, the Union is in compliance with the LMRDA.").

But Johnson insists that his LMRDA claim is not moot and has further stated his intention to "seek[] a jury trial and all damages (economic, non-economic and punitive) and attorneys' fees as provided for by the LMRDA." October 17, 2018 Email from S. Zashin, NFLPA Exhibit A at 1. The NFLPA is unaware of any case where a court has awarded damages under 29 U.S.C § 414. Instead, in the rare cases where a Court issued an order for relief under Section 414, only injunctive relief—*i.e.*, the production of the collective bargaining agreement—was issued. *See, e.g.*, *Acosta v. Local Union 26, Unite Here*, 260 F. Supp. 3d 94, 101 (D. Mass. 2017), *aff'd*, 895 F.3d 141 (1st Cir. 2018) (ruling that union violated section 414 and issuing an order entitling union member to inspect copies of certain collective bargaining agreements). So Johnson's threatened claim for damages (and request for a jury trial) all fail as a matter of law.

Moreover, even if damages were theoretically available under Section 414 of the LMRDA, they indisputably would not be available here. The Court has already ruled that "Johnson . . . fail[ed] to draw any causal link between the NFLPA's failure to provide him with [] documents and the arbitral outcome" (Dismissal Order at 15), and that Johnson "offer[e]d no explanation for why the Arbitrator's ruling could have been affected had Johnson been provided with a copy of the side letters." *Id.* Because all of Johnson's *alleged* injuries flow from the adverse arbitration decision,[5] he could not—as a matter of law—prove any damages based on any putative failure to provide documents under the LMRDA.

The NFLPA had hoped to avoid burdening the Court—and, for that matter, all parties—with further litigation. Unfortunately, in light of Johnson's position, the Union is left with no choice but to seek permission to file a motion for summary judgment against Johnson's lone remaining claim. The undisputed fact of the NFLPA's document production, and the Court's holdings in the Dismissal Order, warrant entry of judgment in favor of the NFLPA as a matter of law. Relatedly, given that there are no disputed issues of fact, the stay of discovery should remain in effect pending the resolution of the NFLPA's motion for summary judgment.

NFL Defendants

The remaining claims against the NFL Defendants are (1) breach of contract under § 301 of the LMRA (Count Seven); and (2) claim for declaratory relief (Count Eleven). In light of the Court's October 3, 2018 Opinion and Order—which denied Plaintiff's petition to vacate the

[5] *See Peterson v. Transp. Workers Union of Am., AFL-CIO*, 75 F. Supp. 3d 131, 135-36, 138 (D.D.C. 2014) (dismissing LMRDA and DFR claims under Rule 12(b)(1) where plaintiffs failed to "allege likely injury arising from [union conduct]"); *see also Amidax Trading Grp. v. S.W.I.F.T. SCRL*, 671 F.3d 140, 146 (2d Cir. 2011) (finding that plaintiff failed to plead injury in fact and noting that "[i]t is well established that we need not 'credit a complaint's conclusory statements without reference to its factual context'") (citation omitted).

arbitral award and dismissed Plaintiff's duty of fair representation claims against the NFLPA—the remaining claims against the NFL Defendants cannot be sustained. *See* Dkt. No. 125 (noting that "a union's breach of the duty of fair representation is a prerequisite to consideration of the merits of [a] plaintiff's claim against an employer for breach of a collective bargaining agreement" (internal quotes omitted) and granting the NFLPA's motion to dismiss Plaintiff's claim for declaratory relief). The NFL Defendants believe that dismissal of the NFL Defendants from this action is appropriate.

Accordingly, the NFL Defendants intend to move to dismiss the remaining claims under Rule 12(c) of the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 12(c) ("After the pleadings are closed . . . a party may move for judgment on the pleadings.").[6] In deciding motions under Rule 12(c), courts employ the same standard applicable to dismissals pursuant to Rule 12(b)(6). *Overseas Private Inv. Corp. v. Furman*, No. 10 Civ. 7096 (RJS), 2012 WL 967458, at *6 n.7 (S.D.N.Y. Mar. 14, 2012) (Sullivan, J.). Additionally, on a Rule 12(c) motion, courts may consider any items of which the court can take judicial notice, including a court's prior orders. *See Brodeur v. City of New York*, No. 04-CV-1859 (JG), 2005 WL 1139908, at *2 (E.D.N.Y. May 13, 2005). Here, the remaining counts against the NFL Defendants fail as a matter of law after this Court's October 3, 2018 Opinion and Order dismissing Plaintiff's breach of duty of fair representation claim against the NFLPA and denying Plaintiff's motion to vacate. *See Acosta v. Potter*, 410 F. Supp. 2d 298, 309 (S.D.N.Y. 2006) (noting that a breach of duty of fair representation claim against a union is a prerequisite to a claim against an employer for breach of a CBA). Plaintiff does not oppose the NFL Defendants' request for a pre-motion conference, but intends to submit a response to the motion. On this basis, the NFL Defendants hereby request a pre-motion conference, pursuant to Rule 2.A of the Court's Individual Rules, to discuss the NFL Defendant's intended motion to dismiss.

Respectfully submitted,

Zashin & Rich Co., L.P.A.	**Winston & Strawn LLP**	**Akin Gump Strauss Hauer & Feld LLP**
Stephen S. Zashin ***Attorney for Plaintiff, David Lane Johnson***	Jeffrey L. Kessler ***Attorney for Defendant, NFLPA***	Daniel L. Nash ***Attorney for NFL Defendants***
/s/ Stephen S. Zashin	*/s/ Jeffrey L. Kessler*	*/s/ Daniel L. Nash*

cc: David Lane Johnson
NFLPA
NFL/NFLMC

[6] The NFL Defendants answered Plaintiff's amended complaint on September 8, 2017. S*ee* Dkt. No. 103. Although the NFLPA has not answered Plaintiff's complaint, the NFL Defendants' motion to dismiss pursuant to Rule 12(c) is nevertheless appropriate. *See Gilman v. Spitzer*, 902 F. Supp. 2d 389, 394 n.3 (S.D.N.Y. 2012) (finding that under Rule 12(c), "the 'pleadings are closed' in the relevant sense when the *pertinent* pleadings are closed" and that "[i]n any event, the result here would be the same if the Court treated Defendants' motion as a Rule 12(b)(6) motion or converted the motion to a Rule 56 motion" (emphasis in original)).